



U.S. Citizenship
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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: NOV 25 2008

IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The employment based visa petition was denied by the Director, Nebraska Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer software developer. It seeks to employ the beneficiary permanently in the United States as a computer electronics mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish its continuing financial ability to pay the proffered wage and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the petitioner had the continuing financial ability to pay the proffered wage.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See*, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) also states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the Form ETA 750 was accepted for processing on April 27, 2001. The proffered wage as stated on Part A of the Form ETA 750 is \$21.70 per hour, which amounts to \$45,136 per year. On Part B of the Form

ETA 750, signed by the beneficiary on April 10, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on May 30, 2006, the petitioner states that it was established in 1971, employs twenty-two workers, claims a gross annual income of \$2,130,467 and a net annual income of \$63,719.

As evidence of its continuing financial ability to pay the proposed wage offer of \$45,136 per annum and in response to the director's request for evidence, the petitioner provided copies of its Form 1120S U.S. Income Tax Return for an S Corporation for 2001, 2002, 2003, 2004, and 2005. The returns that were submitted indicate that the petitioner files its taxes using a standard calendar year and state that the petitioner was established on September 25, 1995. The returns also contain the following information:

	2001	2002	2003	2004	2005
Net Income ¹	\$ 10,828	\$ 22,072	\$ 7,438	\$ 3,961	\$ 62,812
Current Assets	\$162,709	\$276,347	\$114,480	\$ 242,665	\$240,579
Current Liabilities	\$203,674	\$286,147	\$168,876	\$ 278,430	\$243,921
Net Current Assets	-\$ 40,965	-\$ 9,800	-\$ 54,396	-\$ 35,765	-\$ 3,342

In response to the director's request for evidence issued on September 26, 2006, instructing the petitioner to provide copies of all Wage and Tax Statements (W-2s) issued to the beneficiary in each year of employment, along with a copy of his most recent pay voucher, the petitioner submitted no W-2's, but provided a copy of a payroll record for the two-week period ending October 31, 2006, indicating that the petitioner had paid the beneficiary \$1916.67 and had been paid a total of \$7,666.68 in 2006. A letter, submitted by [REDACTED] the petitioner's controller, indicated that the beneficiary had been hired earlier that year, but did not specify a date. She additionally suggested that outside computer repair services that had been paid in the 2001-2005 period were replaced by the hiring of the beneficiary in 2006. She stated that "program development use fees" of \$129,530 claimed on Schedule A of the petitioner's 2004 tax return included payment to outside contractors. In 2003, part of a \$248,048 deduction taken for "outside programming services" as part of larger deduction for \$852,027 was claimed to include payment to outside contractors. In 2002, payments of \$75,000 was claimed to be part of these services and shown on the 2002 tax return as related to programming. In 2001, the letter claimed that \$119,122 shown as subcontract labor on the 2001 tax return was claimed to include payment for these computer electronic repair and adjustment services. The petitioner also submitted copies of unaudited financial statements consisting of profit and loss statements, cancelled checks issued to

¹Where an S Corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. In this case, net income is reflected on line 21 in 2001 and 2002. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. As in this case, if the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004, 2005) and line 22 of Schedule K for 2003. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf>

various individuals and entities, as well as a copy of a Form 1099 issued to a [REDACTED] in 2000, and a copy of a 1999 support services agreement with [REDACTED]. The only copies of invoices reflecting actual services performed during the 2001- 2005 period are copies of two 2001 invoices and one 2003 invoice from [REDACTED] of Whitestone, New York. The 2003 invoice for \$600 reflected the only service performed that would reasonably be included among the job duties specified on item 13 of ETA 750 A, which provided as follows:

Repair computer equipment following manufacture's [sic] specifications and schematics using test instruments and handtools. (sic) Ascertain if equipment breakdown is due to human error or mechanical/electrical problem. Test components to locate defects and replace defective componenets. [sic] Align adjust and calibrate equipment according to specifications.

Following a review of the evidence submitted, the director denied the petition on March 26, 2007. Although the director determined that the petitioner had established its ability to pay the proffered wage of \$45,136 in 2005 through its reported net income, the director found that the neither the petitioner's net income or net current assets for the 2001, 2002, 2003 or 2004 years was sufficient to demonstrate the petitioner's ability to pay. The director declined to accept the petitioner's evidence relating to the past performance of services by independent contractors as probative of the petitioner's ability to pay the beneficiary's proposed wage offer and concluded that there was no evidence that documented the positions, duties and services performed.

On appeal, the petitioner, through counsel provides a copy of the beneficiary's W-2 for 2006 indicating that the petitioner paid \$15,333.36 in wages to him. Also provided is a copy of a 2007 pay voucher indicating that he was paid \$15,416.67 for year-to-date ending April 15, 2007. The petitioner further submits a letter, dated April 5, 2007, from the Chase Bank summarizing the petitioner's average monthly balances for each of the 2001-2005 years and confirming that petitioner maintains two lines of credit for \$75,000 with nothing owed. A letter from [REDACTED], C.P.A., dated April 6, 2007, indicates that the petitioner's tax structure as an S corporation permits the profits to pass through to the shareholders to avoid corporate income taxes. He summarizes the shareholders salaries paid in 2001 through 2006 as \$229,750 in 2001; \$256,500 in 2002; \$153,450 in 2003; \$228,000 in 2004; \$260,000 in 2005; and \$80,000 in 2006. Except for 2001, these amounts are reflected as the officers' compensation on line 7 of the 2002-2005 tax returns. The petitioner's 2006 tax return has not been provided to confirm the amount paid and it is unclear whether [REDACTED] statement of \$229,750 as the shareholder salary for 2001 is meant to refer to \$237,246 that is listed as compensation of officers on the 2001 tax return.

Citing a *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004), counsel asserts that the documentation supports the approval of the petition whereby CIS may accept financial evidence such as bank account records, profit/loss statements, and personnel records in addition to tax returns or audited financial statements. Counsel states that the petitioner had the ability to pay the proffered wage in 2002, 2004, and 2006. Counsel also cites two other AAO cases from 2003, and 2005 for the assertions that the petitioner's normal accounting practices and the totality of its circumstances may be considered to support its eligibility. She maintains that for the 2001-2004 period, the petitioner's average monthly bank balances as represented in the bank letter have exceeded \$65,000, that its tax structure as an S corporation enabled it to pay large amounts to

shareholders, and that its reported gross revenues exceeding two million dollars and large sums paid in salaries and wages all support approval of the petition.

It is noted that Yates Memorandum cited by counsel, is by its own terms, not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but is merely offered as guidance.² It does not supersede the plain language of the regulation at 8 C.F.R. § 204.5(g)(2), which requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. Demonstrating that the petitioner has the ability to pay the proffered wage through its net income or net current assets or is paying the proffered wage to the beneficiary in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. It is further noted that the three AAO decisions cited by counsel are not shown to be precedent decisions. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Although it is noted that the petitioner's average monthly bank balances identified on the bank letter submitted on appeal reflect a substantial amount, they show only a portion of a petitioner's financial profile and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage such as that set forth on an audited financial statement or a corporate tax return. While the regulation at 8 C.F.R. § 204.5(g)(2) and as affirmed in the Yates memorandum, allows additional material to be submitted "in appropriate cases," bank records generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Here, it is noted that while the average monthly balances reflected on the bank letter may represent a substantial cash flow, there was no explanation provided to establish that such amounts would not already have been reflected within the corresponding tax return such as Cash, shown on line 1 of Schedule L. As such, they are already balanced against current liabilities and included in the calculation of a petitioner's net current assets for a given period. If a petitioner feels that its tax return does not fairly represent its financial profile for a given period, it may elect to submit, for example, an audited financial statement. In this case, we do not conclude that the bank letter outweighs the evidence reflected on the petitioner's corporate tax returns or should be accepted as probative of the petitioner's ability to pay the proffered wage in lieu of the information set forth on the corporate tax returns as required by 8 C.F.R. § 204.5(g)(2).

It is further noted that the profit and loss statements submitted to the record in response to the director's request for evidence were not audited, and thus not probative of the petitioner's ability to pay the proffered wage as set forth in 8 C.F.R. § 204.5(g)(2), nor, do they reflect sufficient net income to pay the certified wage of \$45,136. They indicated the petitioner's net income as \$7,155.05 in 2001; \$19,765.74 in 2002; \$5,984 in 2003; and -\$4,711.48 in 2004.

It is further noted that in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular

²See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. Here, the record reflects that the petitioner did not employ the beneficiary until an unspecified date in 2006, although the two-week payroll record for the period ending October 31, 2006, indicates that his wages of \$1,915.67 for that period exceeded the proffered wage of \$1,736 (if calculated for a period of two weeks).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses such as the cumulative salaries paid to other workers as is advocated in this case. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989)); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

It is observed that at least in terms of officer compensation, it may be noted that it represents monies paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. There is also no first-hand evidence from the principal shareholders that such income could have been foregone during the relevant period since the priority date. Moreover, CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Consequently, assets of its

shareholders or of other enterprises or corporations will not be considered in determining the petitioning corporation's ability to pay the proffered wage in this case. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

It is further noted that the court in *Matter of Sonogawa* 12 I&N Dec. 612 (Reg. Comm. 1967), sustained an appeal where factors other than net income support an employer's ability to pay the proffered salary. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). Here, except for 2005, none of the other four federal tax returns submitted to the record reflect sufficient net income or net current assets that would cover payment of the proffered wage. While the petitioner reported substantial gross revenue, it also reported substantial expenses. Its net income of \$22,072 was the highest declared in the years from 2001 through 2004. It cannot be concluded that this represents the kind of framework of profitability such as that discussed in *Sonogawa*, or that the petitioner has demonstrated that such unusual and unique business circumstances or reputational factors exist in this case, which are analogous to the facts set forth in that case.

Additionally, it must be noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to establish its *continuing* financial ability to pay the certified salary as of the priority date. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). If the preference petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

In the instant matter, as suggested by the director, although the petitioner's net income of \$62,812 was sufficient to establish its ability to pay in that year, the petitioner has not demonstrated its ability to pay for the remaining period. It is noted that as the record stands, we do not find sufficient evidence to calculate the petitioner's ability

to pay the proffered wage for the entire year of 2006 as the date of the commencement of the beneficiary's employment was not offered and other than his payroll record of October 31, 2006 and a W-2 for that year indicating \$15,333.36 total wages paid by the petitioner, there is no audited financial statement or other documentation to include in the consideration of the petitioner's ability to pay the proffered wage for this period of time.

It is noted that neither the petitioner's net income of \$10,828 nor its net current assets of -\$40,965 were sufficient to establish its ability to pay the proffered wage in 2001.

In 2002, neither the petitioner's net income of \$22,072 nor its -\$9,800 in net current assets was enough to demonstrate its ability to pay the proposed wage offer of \$45,136.

Similarly, in 2003, neither the \$7,438 in reported net income nor the petitioner's -\$54,396 could cover the certified wage or establish the ability to pay. As noted above, even if the \$600 shown to be paid to an outside contractor in that year for services that could have been performed by the beneficiary, were treated as wages to the beneficiary, the amount would be insignificant.

In 2004, the petitioner's net income of -\$3,961, nor its net current assets of -\$35,765 was sufficient to pay the proffered salary or demonstrate the petitioner's ability to pay in this year.

As noted above, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a *continuing* financial ability to pay the proffered wage. Based on a review of the underlying record and the arguments and evidence submitted on appeal, it may not be concluded that the petitioner established a continuing ability to pay the proffered wage as of the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.